

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

JOSE ROSILES-PEREZ, JESUS)	
SANTIAGO-SALMORAN, and HECTOR)	
ORTIZ-MORA, on behalf of themselves)	
and all others similarly situated,)	Case No. 1:06-CV-0006
)	
Plaintiffs,)	Judge William J. Haynes, Jr.
)	
SUPERIOR FORESTRY SERVICE, INC.,)	
WILLIAM IOUP, SCOTT BARSTOW,)	
ENRIQUE GONZALEZ,)	
HECTOR SANTILLAN, and)	
MANUEL MORALES-MARTINEZ,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR
PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION
SETTLEMENT AGREEMENT AND NOTICE TO CLASS MEMBERS**

The parties submit this memorandum in support of their joint motion, pursuant to Federal Rule of Civil Procedure 23(e), for preliminary approval of the class action settlement agreement and approval of the proposed notice of settlement. The proposed Stipulation of Class Action Settlement Agreement (“Settlement”), the proposed Notice of Proposed Settlement of Class Action and Settlement Hearing, and the Claim Form are attached to the Motion, as is a proposed preliminary approval Order.

From the Plaintiffs' perspective, the proposed Settlement is a significant victory. It requires Defendants to: (1) pay \$2.2 million into a Class Settlement Fund in three equal installments; (2) pay 4% interest on the final two Settlement Fund installments; (3) agree to abide by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and the Fair Labor Standards Act ("FLSA") requirements related to the reimbursement of *de facto* wage deductions for pre-employment visa, transportation, border crossing, and related costs; (4) agree to abide by the AWPA and FLSA requirements with respect to what constitutes compensable time, including compensable travel time; (5) ensure that their record-keeping practices are consistent with the AWPA and the FLSA; (6) pending Court approval, pay Class Counsel costs and attorneys' fees in the amount of \$550,000 in three equal installments, with 4% interest on the final two installment payments; and (7) pay up to \$50,000 per Settlement distribution (up to \$150,000 total) to cover, *inter alia*, the costs of providing Notice to the class members, locating class members to have them file claims, delivering settlement funds to the class members, and the costs associated with the Settlement Fund Administrator. The proposed Settlement also contains the personal guarantees for the payment of the Settlement Installments by the individual Defendants, as well as additional shareholders of Superior Forestry Services, Inc. From the Defendants' perspective,

the proposed Settlement ends this litigation, releases claims against them by the class members, and provides them certainty with respect to future costs in a manageable way.

The Plaintiffs, Class Counsel, and the Defendants submit that the Settlement and all of its terms are fair, reasonable, and adequate, and certainly well within “the range of reasonable” required for preliminary approval. The parties also affirm that they have not entered into any other agreements in connection with the proposed Settlement. All parties respectfully submit that the motion for preliminary approval should be granted.

I. Procedural Background

A. The Course of the Litigation

Named Plaintiffs Jose Rosiles-Perez and Jesus Santiago-Salmon, and another plaintiff whose subsequent withdrawal as a class representative was approved by the Court, filed the original complaint on January 25, 2006, on their own behalf and on behalf of a proposed class of more than 2,200 similarly-situated forestry laborers. The complaint named Superior Forestry Service, Inc. as a Defendant, as well as corporate officers William Ioup and Scott Barstow. On February 12, 2008, Plaintiffs amended their complaint to remove one of the original class representatives and substitute Named Plaintiff Hector Ortiz-Mora,

and again on December 9, 2008, to add individual Defendants Enrique Gonzalez, Hector Santillan, and Manuel Morales-Martinez.

Plaintiffs filed and have pursued this action to recover unreimbursed expenses associated with obtaining H-2B visas, unpaid wages, statutory penalties, and injunctive relief pursuant to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1854 (“AWPA”). The action has been pursued and certified as both a FLSA collective action, and a Rule 23 class action for pursuit of the AWPA claims.

During the nearly four-year pendency of the lawsuit, the Parties engaged in extensive merits discovery, including depositions of the Named Plaintiffs, three FLSA opt-in Plaintiffs, individual Defendants William Ioup, Enrique Gonzalez, Hector Santillan, and Manuel Morales-Martinez, and several of Defendants’ crew foremen; comprehensive discovery of Defendants’ payroll, accounting, and other electronic databases; and extensive document discovery. Defendants also filed a motion for partial summary judgment, which was denied without prejudice, for renewal after discovery closed.

In addition, Plaintiffs moved three times for judicial intervention to prevent conduct that they alleged amounted to wrongful interference with class member

participation in the lawsuit. The Court entered progressively severe sanctions, including equitable tolling of the FLSA statute of limitations and two additional rounds of FLSA notice and extensions of the Opt-in period, culminating in its July 27, 2009 Order “bar[ring] Defendants from submitting any proof to contest the Plaintiffs’ proof of damages.” (Doc 492.)

B. Settlement Efforts

The parties were originally scheduled for a settlement conference with Magistrate Judge Bryant on December 2, 2008 after Defendants’ filed a motion requesting the conference. (Docs. 340, 351, 365.) Unfortunately, that settlement conference did not occur. The parties subsequently scheduled mediation with private mediator Judge William Cahill, a retired judge employed by JAMS. The parties conducted two days of mediation on August 20th and 21st, 2009, but were unable to reach an agreement. However, at the conclusion of the mediation sessions in August, the parties did reach agreement on a special sixty day discovery period for the Plaintiffs to examine the corporate and individual Defendants’ assets and financial resources. That special discovery period was later extended an additional thirty days. (Docs. 497, 511.) During that time, Plaintiffs obtained and analyzed thousands of pages of corporate and individual financial records, and took the depositions of Superior Forestry’s in-house accountant

Hayley Tester, as well as Superior Forestry's President, and individual Defendant, William Ioup. Upon completion of the special asset discovery period, the parties asked Judge Cahill to return for another day of mediation on December 7, 2009. Late in the day on December 7th, the parties agreed to the general outlines of the proposed Settlement by accepting a proposal crafted by the mediator.

Plaintiffs and their counsel recommend the Settlement as a fair, adequate and reasonable resolution of their claims. As stated, the general outlines of the agreement are the result of the parties' acceptance of the mediator's proposal after extensive arms-length negotiations, and after Class Counsel spent significant time analyzing the financial information disclosed during discovery. Class Counsel believe the settlement maximizes the recovery for the Class while at the same time safeguarding class members—some of whom depend on Defendants' continued operations for their livelihood—from any negative effect that such recovery might have on the viability of Defendants' business.

II. Terms of the Proposed Settlement Agreement

A. Class Payments

The proposed Settlement requires Defendants to pay into a Class Settlement Fund a principal amount of \$2,200,000 in three equal installments beginning 15 days after Judgment in this case becomes Final. In addition, Defendants will pay a

total of \$88,000 in interest to the Class Settlement Fund, representing 4% annual interest on the final two installment payments. As security for the installment payments, the individual Defendants, as well as additional Superior Forestry shareholders who were not named as Defendants in the litigation, have provided personal guarantees for the payment of the sums outlined in the proposed Settlement.

Class Counsel, with the assistance of the proposed Settlement Administrator, Settlement Services, Inc., will administer the Fund, compute each claiming class member's proportionate share, and distribute payments. As described in the proposed Notice (Exh. A), AWWPA class member shares will be calculated based on the number of seasons employed within the class period in relation to the total number of seasons of all claiming class members, determined presumptively by the company's payroll records, subject to correction based on proof provided by individual class members who dispute the number of seasons for which they are credited. FLSA opt-in Plaintiffs will receive \$1,000 per season they were employed within three years of the filing of their FLSA consent, which will include the tolling provisions already entered by the Court. No portion of the Fund will revert to Defendants under any circumstances.

Because most of the class members reside in Mexico, and because the Defendants' making three installment payments will increase the costs of distribution of the funds to class members, the Defendants have agreed to pay up to \$50,000 for each settlement distribution period to cover the costs of administration. This will include the costs associated with wire transfers, Western Union fees, and other bank fees that may be associated with class members claiming their money, such that class members will not see their recovery diluted by the payment of fees to obtain their funds.

B. Affirmative Remedies

The Settlement also provides the following affirmative relief: (1) prohibiting Defendants and their agents from retaliating in any manner against the named Plaintiffs, their family members, witnesses, and others who participated in the prosecution of this action; (2) requiring the Defendants to abide by AWPA and FLSA requirements related to the reimbursement of *de facto* wage deductions for pre-employment visa, transportation, border crossing, and related costs; (3) requiring the Defendants to abide by AWPA and FLSA requirements with respect to what constitutes compensable time, including compensable travel time; (4) requiring Defendants to ensure that their record-keeping practices are consistent with the AWPA and the FLSA; and (5) requiring Defendants to ensure that

workers engaged in tree planting will be paid for all trees they correctly plant in accordance with the disclosed working arrangement.

C. Individual Plaintiff Provisions

In consideration for the named Plaintiffs' and some of the FLSA opt-in Plaintiffs' commitment to this action, including providing assistance in contacting and locating class members and opt-in Plaintiffs, providing information useful to Class Counsel's understanding of Defendants' operations, and providing deposition, hearing, and other testimony in support of the class members' claims, the Settlement contemplates that the three named Plaintiffs will each receive \$7,500 in addition to their other payments, and thirteen other individuals will receive additional payments of either \$2,000 or \$4,000. These payments will total only \$60,500 of the \$2,200,000 Settlement Fund.

D. Attorneys' Fees and Costs

The proposed Settlement requires Defendants to pay Class Counsel attorneys' fees and costs incurred in prosecuting the action, pending Court approval. Defendants will pay total fees and costs of \$550,000 in three equal installments, plus 4% interest on the final two installment payments. Class Counsel has incurred unreimbursed costs to date of approximately \$120,000. The remaining principal amounts that will constitute attorneys' fees, approximately

\$430,000, represents a more than 50% reduction in Class Counsel's lodestar figure for hours dedicated to the prosecution of this case to date.

E. Class Notice

The Settlement provides that within 10 days of the Court's preliminary approval of the Settlement and Notice, Class Counsel will mail the Notices and a Claim Form to each class member.¹ Defendants will also provide a copy of the Notice and Claim Form to all class members who are currently employed at Superior Forestry Service, Inc. In addition, within 10 days of the Court's preliminary approval, Defendants will send the required notices pursuant to the Class Action Fairness Act, thereby triggering the 90-day period before the Court may enter Judgment.

The proposed Notice explains: the nature of the class action; the definition of the Class; the terms of Settlement; the minimum amount of the monetary benefits the Settlement will provide for claiming class members; the class members' right to file objections or request exclusion from the Settlement, the consequences of doing so, and the process to follow; the date for the Fairness Hearing at which the Court can hear objections to the proposed settlement; and the

¹ The proposed Notice attached to the Motion is in both English and Spanish. However, only the Spanish version of the Notice will be mailed to class members, as all of them maintain their permanent residences in Mexico and understand little or no English.

toll-free number that may be used to direct questions to Class Counsel.² The Claim Forms attached to the Notice provide instructions for submitting claims, applicable deadlines, and the minimum amount the individual class member will receive.

III. Legal Standard for Preliminary Approval of Class Action Settlement

The “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). While not required, some courts employ a two-step process to determine whether to grant approval to a proposed settlement, consisting of a preliminary evaluation of the proposed settlement, followed by a final approval determination after appropriate notice to the class. In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 359, 379 (N.D. Ohio 2001).

In conducting the preliminary evaluation, the Court must determine whether the proposed settlement appears to fall within the range of possible approval. MANUAL FOR COMPLEX LITIG. THIRD, § 30.41, at 237 (1995). Preliminary approval should be granted if “the proposed settlement does not disclose grounds to doubt

² The proposed Notice does not currently contain the toll-free number to reach Class Counsel that class members can call to obtain further information. Class Counsel is attempting to set up a dedicated, additional 1-800 number that accepts toll-free calls from both Mexico and the United States that is separate and distinct from Class Counsel’s existing 1-800 number. As of this filing, that number has not yet been provided by Class Counsel’s telephone carrier. If the number is not available by the deadline to send out Class Notices, then Class Counsel will simply use their existing 1-800 number on the Notices.

its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys” Id. Upon preliminary approval, class members should be sent notice of the settlement for consideration. Id.

The preliminary approval determination, unlike final approval, does not require the Court to hear arguments or consider evidence to determine whether the proposed settlement is “fundamentally fair, adequate, and reasonable.” Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir.), cert. denied, 506 U.S. 953 (1992). At the preliminary approval stage, “the Court's duty is to conduct a threshold examination the overall fairness and adequacy of the settlement in light of the likely outcome and the cost of continued litigation.” In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. at 379.

A. The terms of the proposed Settlement are fair, adequate and reasonable.

The proposed Settlement provides substantial monetary and other affirmative relief to the Class. The negotiated monetary relief will provide claiming class members with an almost 100% reimbursement of the expenses they incurred each season over a potential 9-season period to obtain H-2B visas and travel to the United States to work for Defendants, a central legal issue in this litigation. The monetary relief will also provide the FLSA opt-in Plaintiffs with

\$500 per season in back wages, plus an additional \$500 per season in FLSA liquidated damages. Equally important to the Class are the nine personal guarantees that act as security for the payment of the class funds that will occur over a more than two-year period, four of which would not have been obtained through continued litigation through judgment. Moreover, because the Defendants are providing up to \$50,000 per settlement distribution, the class members' payments will not be diluted by bank, Western Union, or other fees normally associated with the distribution of settlement funds to individuals in foreign countries.

The injunctive relief will secure Defendants' compliance with AWPA and FLSA requirements related to *de facto* deductions from wages for visa fees, transportation costs, and related expenses, as well as AWPA and FLSA requirements related to compensable work time, including travel time. Defendants will also be required as part of the injunctive relief to comply with all AWPA and FLSA record-keeping provisions and pay tree planters for all trees properly planted, in accordance with the disclosed working arrangement. The proposed Settlement also reinforces the provisions against retaliation previously entered by this Court.

In summary, the proposed Settlement provides substantial monetary and injunctive relief to the Class. These significant benefits will be provided to class

members without the burden and risk of further litigation. The proposed Settlement is well within the range of possible approval and should be preliminarily approved. In re Prudential Secs. Inc. Ltd. Partnerships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (“there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions”) (citations omitted).

B. The Court should approve the proposed notice.

Pursuant to Federal Rule of Civil Procedure 23(e)(1), “the court must direct notice in a reasonable manner to all class members who would be bound by the proposed [settlement].” The parties’ proposed Notice, which will be sent in Spanish to the addresses the Defendants’ maintained for the class members in their employee database, fully satisfy the rule and the requirements of due process. See UAW v. General Motors Corp., 497 F.3d 615, 629-30 (6th Cir. 2007) (noting that notice should be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections). The Notice will also be delivered by Defendant Superior Forestry to its current employees who are members of the class. The proposed Notice contains all of the information necessary for an individual to determine whether to remain in the class, whether to opt-out, whether to file an objection to the terms of the Settlement, how to file a claim to obtain a share of the Settlement Fund, and the

deadlines related to each option.

CONCLUSION

For the reasons stated above, the Parties respectfully request that the Court enter the proposed order granting preliminary approval of the Settlement and approving the Notice of Settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by the Court's electronic filing system (CM/ECF) on counsel named below:

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